Supreme Court, U.S.
FILED
NOV 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-685

In The
Supreme Court of the United States
October Term, 1987

CITY OF PAGEDALE, MISSOURI,
Petitioner,

vs.

ELLENA HARRIS and MICHAEL HAYLES,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

Page

Table of Authorities ii

Statement of Case 1

Reasons for Denying the Writ 1

I. The Eighth Circuit Properly Affirmed The District Court's Holding That The Plaintiff Had Proved She Was Raped And Sodomized As A Direct And Proximate Result Of The Deliberate Indifference Of City Officials To A Pattern Of Sexual Misconduct By City Police Officers, Especially Officer Hayles, That On Repeated Occasions City Officials In Positions Of Authority And Responsibility Were Notified Of These Offensive Acts, But That Upon Receiving Such Notice, These City Officials Repeatedly Failed To Take Any Remedial Action, And This Case Does Not Present Any Important Question Of Federal Law Requiring The Consideration Of This Court 2

II. The Eighth Circuit, In Harris vs. Pagedale, Is Utterly Consistent With Holdings In Other Circuits, Including The D.C. Circuit's Opinion In Carter vs. District Of Columbia 27

Conclusion 29

TABLE OF AUTHORITIES

Page

CASES

Baker v. McCoy, 739 F.2d 381 (8th Cir. 1984) 24

Black v. Stephens, 662 F.2d 181 (3d Cir. 1981) cert. denied 455 U.S. 1008 (1982) 22, 23, 24

Carter v. District of Columbia, 795 F.2d 116 (D.C.C. 1986) 27, 28, 29

Daniels v. Williams, 474 U.S. —, 88 L.Ed.2d 662 (1986) 25

Davidson v. Cannon, 474 U.S. —, 88 L.Ed.2d 677 (1986) 25

Depew v. City of St. Mary's Georgia, 787 F.2d 1496 (11th Cir. 1986) 22

Fiacco v. City of Rensselaer, 783 F.2d 319 (2d Cir. 1986) 22

Fundiller v. City of Cooper City, 777 F.2d 1436 (11th Cir. 1985) 22, 24

Gilmere v. City of Atlanta, 737 F.2d 894 (11th Cir. 1984) 24

Goodman v. Parwatikar, 570 F.2d 801 (8th Cir. 1978) 26

Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981) 22, 23, 24, 25

Hollins v. Powell, 773 F.2d 191 (8th Cir. 1985) 25

Martin v. White, 742 F.2d 469 (8th Cir. 1984) 26

Monell v. Dept. of Social Services, 436 U.S. 658 (1978) 26, 27

Patzner v. Burkett, 779 F.2d 1363 (8th Cir. 1985) 24

Porm v. White, 762 F.2d 635 (8th Cir. 1985) 26

TABLE OF AUTHORITIES—Continued

Page

Strauss v. City of Chicago, 760 F.2d 765 (7th Cir. 1985) 24

Wade v. Haynes, 663 F.2d 778 (8th Cir. 1981) aff'd sub nom *Smith v. Wade*, 461 U.S. 30 (1982) 26

STATUTES

42 U.S.C. § 1983 ..... 1, 2, 22, 23, 25

STATEMENT OF THE CASE

Plaintiff Ellena Harris was falsely arrested, illegally detained, raped, sodomized and assaulted by Defendant Michael Hayles in a cemetery on January 29, 1985, while Defendant Hayles was employed by Petitioner City of Pagedale as a police officer and while Hayles was on duty in that capacity.

Plaintiff brought suit against Hayles and Pagedale pursuant to 42 U.S.C. § 1983. A jury trial was conducted on May 20-23, 27 and 28, 1986. Defendant Hayles appeared *pro se* and was absent for most of the proceedings.

The jury returned a verdict in favor of Plaintiff and against Defendant Hayles and the City of Pagedale for $200,000.00 on May 28, 1986. The Court entered judgment in favor of Plaintiff on the jury verdict on May 29, 1986. The Eighth Circuit unanimously affirmed the judgment on June 17, 1987.

REASONS FOR DENYING THE WRIT

The issue presented to the District Court and to the Eighth Circuit in this case was whether the defendant City of Pagedale was liable for the rape and sodomy inflicted upon Ellena Harris, Respondent herein, by Pagedale police officer Michael Hayles. The plaintiff's theory of liability was based on proof that there was, for a significant period of time prior to her attack in the graveyard, a custom within the City of Pagedale wherein policymaking officials in positions of authority failed to receive, investigate and act upon citizen complaints of police misconduct. Plaintiff asserted at trial that the City of Pagedale displayed deliber-

ate indifference to overwhelming evidence of police sexual and physical misconduct and that that custom was a moving force behind the rape and sodomy of Ellena Harris. Plaintiff contended, and both the District Court and Eighth Circuit agreed, that this custom violated 42 U.S.C. § 1983.

I

THE EIGHTH CIRCUIT PROPERLY AFFIRMED THE DISTRICT COURT'S HOLDING THAT THE PLAINTIFF HAD PROVED SHE WAS RAPED AND SODOMIZED AS A DIRECT AND PROXIMATE RESULT OF THE DELIBERATE INDIFFERENCE OF POLICYMAKING CITY OFFICIALS OF THE CITY OF PAGEDALE TO A PATTERN OF SEXUAL MISCONDUCT BY CITY POLICE OFFICERS, ESPECIALLY OFFICER MICHAEL HAYLES, THAT ON REPEATED OCCASIONS CITY OFFICIALS IN POSITIONS OF AUTHORITY AND RESPONSIBILITY WERE NOTIFIED OF THESE OFFENSIVE ACTS, BUT THAT UPON RECEIVING SUCH NOTICE, THESE CITY OFFICIALS REPEATEDLY FAILED TO TAKE ANY REMEDIAL ACTION AND THIS CASE DOES NOT PRESENT ANY IMPORTANT QUESTION OF FEDERAL LAW REQUIRING THE CONSIDERATION OF THIS COURT

The voluminous evidence of liability on the part of Petitioner Pagedale falls into three basic categories. The first category is the evidence of notice given to Pagedale policymakers prior to the rape, sodomy and assault of Plaintiff-Respondent Ellena Harris, concerning acts of misconduct committed by Pagedale police officers. These acts are limited to those involving physical and sexual assault or misconduct and false arrest. In most instances, several witnesses corroborate the same acts of police misconduct which were reported to Pagedale officials. In-

cluded in this category are both substantive proof of the truth of the allegations and proof of the notice communicated to Pagedale policymakers.

The second category of evidence is that which demonstrates the failure of Pagedale officials to properly respond to citizen complaints of such misconduct by police officers. This evidence refers to both misfeasance and malfeasance.

The third category delineates the authority and policymaking functions of the Mayor, the Board of Aldermen and the Chief of Police.

Category One: Evidence of Prior Police Misconduct and Notice to Pagedale Officials

Substantive Evidence

The assault, rape and sodomy committed by Detective Michael Hayles upon Ellena Harris is undisputed. Plaintiff's attorney read into evidence the indictment (T. 1/55), the guilty plea (T. 1/58) and the sentencing of Defendant Hayles (T. 1/69). As to substantive evidence of prior misconduct by Defendant Hayles, the plaintiff testified, without objection, that Hayles bragged to her, in the police station, that ". . . lots of women have been stopped and he have (sic) did it before," and that, ". . . all I had to do was cooperate with him and that I could go home." (T. 1/114). By "cooperate with him," Hayles said he meant, "That we couldn't go to a hotel because he was on duty, but he knew somewhere we could go." (T. 1/115). Plaintiff also testified, again without objection, that after the first rape and sodomy occurred in the cemetery, Hayles

said to her, ". . . I always come over here when I can't go to a hotel. He said I always come over here." (T. 2/29).

Arthurine Jones was a police officer for the City of Pagedale at the time of what has come to be known as the Prothro incident in the Summer of 1983. She testified she heard a woman crying down the hall and went to investigate. (T. 3/76). Officer Jones walked into the traffic office and found Hayles and Michelle Prothro in the room with the lights off. The girl was crying hysterically. (T. 3/77).

Officer Jones further testified that, after the Prothro incident, she had to clear some property out of Hayles' desk. In the desk, she found magazines portraying women tied up in various positions in the nude. (T. 3/91). Acting Chief Charles Johnson and Lt. Corbett were subsequently shown the magazines. (T. 3/99).

Even later, Alderman John Taylor, along with the then newly appointed Police Chief, Charles Johnson, and Lt. Corbett, were in the police department when the men had occasion to open Detective Hayles' briefcase. In it they found magazines containing pictures of nude women who were tied up. *Rope was also found in the briefcase.* (T. 3/144).

Witness Tina Forbes testified on behalf of the plaintiff that Hayles stopped her car in January, 1985 (T. 3/190) and found a small amount of marijuana in her car (T. 3/194). After taking Ms. Forbes to the Pagedale Police Department Forbes testified that Hayles asked her, "Will you give me some pussy if I let you go?" (T. 3/197).

Hayles then kissed Ms. Forbes on the lips without her consent. She agreed to have sex with Hayles because

she was afraid for her life. (T. 3/197). Hayles told Ms. Forbes that he would release her and that she should meet him that night at 11:30 p.m. in front of her home. (T. 3/198). Hayles also told her that if she told anyone about what he had done, he would come back and arrest her (T. 3/199). Hayles, indeed, came to her apartment building that night. (T. 3/201). She did not go outside to meet Hayles and the next night, while she was emptying her trash, Hayles caught her in her parking lot and forced her to agree to meet him at a nearby service station. (T. 3/201). Again, Ms. Forbes failed to meet Hayles and he called her home several times after that. (T. 3/202).

Substantive evidence was presented, during the course of the trial, of misconduct of Pagedale police officers other than Michael Hayles. While Leatrice Dowd was on the Board, prior to October, 1984, she testified, that three Pagedale police officers held the Board in City Hall, against their wishes, and told the Board they would not be released until the Board told the officers what pay raises they would get. (T. 6/151). They "manhandled" *Alderwoman Darlene Crawley.* (T. 6/152).

Mayor Mary Hall testified that Odis Williams was appointed Chief on June 10, 1982. (T. 6/166). On that night, Mayor Hall and Alderwoman Louise Hall were forcibly denied entrance to the Board meeting by police officers so that a new ordinance, which allowed Williams to be appointed chief, could be enacted without opposition. (T. 6/169-71).

On another occasion, Chief Williams falsely arrested Mayor Hall and said he was going to impeach her. (T. 6/206). Chief Williams was convicted on two counts of

perjury for testimony given regarding this arrest of Mayor Hall. (T. 3/40).

Notice Evidence

The Michelle Prothro Incident:

After describing the incident between Hayles and Michelle Prothro in June, 1983, Officer Tina Jones testified that she had told Chief Odis Williams exactly what she had observed when Williams questioned her about the matter. (T. 3/87).

Lt. Frederick Searcy had been with the St. Louis Metropolitan Police Department for thirty years at the time of the trial below. During the Summer of 1983, he was Watch Commander of the Seventh District. (T. 3/46). Lt. Searcy, currently staff aide to Congressman William L. Clay, testified as to the details of the so-called Prothro incident. Searcy, Michelle Prothro and Barbara Prothro, Michelle's mother, made a formal complaint against Hayles to Chief Odis Williams in Williams' office. (T. 3/59). Barbara Prothro told Chief Williams, in the presence of Lt. Searcy, that Hayles had had Michelle at the Pagedale police station and had threatened her. (T. 3/63). Hayles took Michelle to a small, dark room, threw a coat over her head and fondled her. (T. 3/64). Hayles put his hands in Michelle's pants. (T. 3/70).

Searcy heard Chief Williams say he was sick and tired of Hayles, that this was not the first time this had happened, that Williams had received previous complaints about Hayles and that Hayles was creating lots of problems. (T. 3/65).

St. Louis County Police Sex Crimes Unit Detective Alysia Johns testified that in June, 1983, she and her partner, Det. Lane Hollingsworth spoke with Chief Odis Williams pertaining to the Prothro investigation. (T. 4/60).

Louise Hall spoke with complainant Michelle Prothro and also believed Ms. Prothro's story about Hayles having sexually assaulted her. (T. 2/216). Although the Prothro complaint was not written, Alderwoman Hall considered it to be a formal complaint. (T. 3/32).

Alderwoman Louise Hall and Lt. Searcy told Mayor Hall about the Prothro complaint. (T. 6/182). Officer Alene Helms also told Mayor Hall about the incident. (T. 6/185). Mayor Hall personally spoke with Michelle Prothro about her assault (by telephone) and spoke with Michelle's mother concerning the complaint. (T. 6/186).

Alderwoman Hall admitted that she and Mayor Hall had called a Board meeting concerning the complaint that Hayles had assaulted Michelle Prothro in the Pagedale Police Department. (T. 2/202).

Alderman John Taylor admitted that Mayor Hall and Alderwoman Hall told him about the Prothro incident as having involved sexual misconduct by Hayles in June of 1984 [later Taylor corrected this date to June, 1983 (see T. 3/130)] in the front office of the Pagedale City Hall. (T. 3/115). The Prothro incident was also discussed at a personnel meeting of the Board of Aldermen. (T. 3/118).

City Attorney Jess Ullom testified he first learned of the Prothro incident when Mary Hall or Louise Hall brought up the complaint at a meeting. The women had

a letter to Barbara Prothro (Plaintiff's Exhibit 13) (T. 7/39). This was, in fact, the only way the Board ever learned that Williams had conducted an investigation. (T. 7/41).

Leatrice Dowd also admitted knowing about the Prothro incident. (T. 6/66).

The Tammy Owens Videotape:

Lt. Greenbaylum Walker of the Northwoods Police Department videotaped an interview of a female resident of the City of Pagedale named Tammy Owens in August or September of 1983. (T. 2/107). Lt. Walker telephoned the Mayor of the City of Pagedale, Mary Hall, within one or two days after the interview. (T. 2/109). Lt. Walker told Mayor Hall:

> I told her that I had viewed a video tape of a person that was in the custody of our department that had statements on it concerning a member of her police department that I felt that she should be apprised of *that could probably cause problems later if something wasn't done.* (T. 2/109). (emphasis added).

Lt. Walker told Mayor Hall that the officer in question was Michael Hayles. (T. 2/110).

Mayor Mary Hall and Alderwoman Louise Hall saw the videotape in late August or early September of 1983. (T. 2/110). Lt. Walker told Mayor Hall he thought this could cause trouble in the future. By that he meant:

> Either the person was not telling the truth and would continue to spread the rumor and that would be a problem I could foresee, or the person was telling

the truth and there could be the possibility of someone being assaulted. (T. 2/117).

Alderwoman Louise Hall testified that she had, indeed, seen the Owens videotape in August, 1983. (T. 2/186). She and Mayor Hall saw the tape; " . . . right after we had some questions about Michael Hayles in a previous thing that was being investigated." (T. 2/187).

Louise Hall described the allegations made by Tammy Owens against Michael Hayles in the videotape. She said Owens talked about how Hayles picked her up numerous times and he always made deals with her and took her to the park and to the Pagedale Industrial Court and to a hotel in Wellston. (T. 2/188). Hayles *tied Ms. Owens up and took nude photographs of her in the hotel.* Ms. Owens said Hayles threatened to book her if she refused to do as he told her. (T. 2/190). When Louise Hall viewed the tape, she believed the allegations made against Hayles (T. 2/193) and believed that he was a "sexual freak." (T. 3/41).

Alderwoman Hall discussed the tape with Mayor Hall (no relation to Alderwoman Hall). (T. 2/191). Louise Hall told Mary Hall, on the way home from viewing the videotape, that she thought this was something they needed to bring to the attention of the other Board members. (T. 2/199).

At a Board meeting, Mayor Hall told the Board about the Tammy Owens complaints concerning Michael Hayles. This was the videotape Mayor Hall was summoned to view by the Northwoods Police Department. (T. 6/176). She confirmed that she and Louise Hall had viewed the tape together. (T. 6/178).

According to Mayor Hall, Tammy Owens stated, on the videotape, that, among other things, Hayles tied Ms. Owens up and took her to the Pagedale Industrial Court. (T. 6/178). Mayor Hall believed the allegations made by Tammy Owens when she viewed the tape. (T. 6/179).

Mayor Hall told City Attorney Jess Ullom about the videotape and took the allegations made by Tammy Owens against Hayles to the Board of Aldermen. (T. 6/180). The tape was played for the jury and admitted into evidence.

Other Complaints Against Michael Hayles:

A Pagedale citizen, Maurice Lovejoy, wrote letters to all Board members complaining that Officer Michael Goodrich and Officer Michael Hayles were picking on him. (T. 2/211). Alderwoman Hall knew of other complaints which had been lodged against Hayles and other Pagedale police officers, as well, for assault.

Mayor Hall received a complaint by Tammy West, still another resident of Pagedale, through Louise Hall. Mrs. West had told Louise Hall that Hayles had arrested her, locked her up at City Hall, *tied her feet* and, "sexually approached her." (T. 6/173). Mayor Hall communicated this complaint to Alderman John Taylor and to City Attorney Jess Ullom. (T. 6/174). She then presented the complaint to the entire Board at a personnel meeting. (T. 6/175). She also told the Board about a number of complaints she had received about Hayles regarding sexual approaches. (T. 6/175).

Mayor Hall received another complaint about Hayles from Mary Ann Williams, a Pagedale resident and City employee. (T. 6/193). Mrs. Williams told the Mayor that

Hayles had locked her up in a cell and that she felt certain Hayles was watching her through the jail's closed circuit television camera so that Mrs. Williams was afraid to go to the bathroom. (T. 6/194). Mayor Hall reported this incident to the Board. (T. 6/195).

Robin Lee complained to Mayor Hall about Hayles. She told the Mayor that Hayles had arrested her and *tied her up with rope.* (T. 6/196). Mayor Hall believed Ms. Lee and reported the incident to City Attorney Jess Ullom and Alderwoman Louise Hall. (T. 6/197).

A portion of the deposition of Michael Hayles was read to the jury. Hayles said Chief Charles Johnson approached him on the street in January, 1985. Johnson said he had received a complaint from a mother that Hayles had come to her home and had tried to force the woman to allow Hayles to date her teenage daughter. (T. 6/43).

Mayor Mary Hall's Complaints Against Chief Odis Williams:

On November 16, 1982, Mayor Mary Hall sent a letter to the Board, (Plaintiff's Exhibit 12) stating that Chief Williams falsely arrested The Mayor and others on trumped up charges on June 12, 1982; that Williams held the Mayor and other citizens hostage for seven to eight hours on June 18, 1982 at a local Pagedale business establishment; and that during that time Williams fluorished his weapon and fired a shot. Mayor Hall also indicated that complaints had been filed against Chief Williams for rape and sodomy by Pagedale residents. These events (the rapes and sodomy) took place in a Pagedale vehicle. (T. 6/80).

Specifically, Annie Benjamin had complained to Mayor Hall that Chief Williams had forced her to commit oral sex upon him. (T. 6/200). Mayor Hall initially relayed the complaint to Jess Ullom and Louise Hall. These were the allegations that were also addressed by Mayor Hall in her letter to the Board of Aldermen. (T. 6/201).

In addition, Ms. Meggie George complained to Mayor Hall that Chief Williams had taken her to Heman Park in University City and forced her to commit other oral sex acts on himself and Clarence Wilson, another Pagedale employee. (T. 6/198). Chief Williams threatened Ms. George into submitting to these sex acts. Each of the forced sex acts took place in the Police Chief's car. (T. 6/199).

Mrs. Dowd admitted that all Board members received a letter from Mayor Mary Hall, dated November 16, 1982, accusing three Pagedale police officers—Ricky Collins, Michael Hayles and Odis Williams—of various acts of false arrest, sexual misconduct and physical assault. (T. 6/76).

Alderperson Dowd knew that the acts of rape and sodomy allegedly committed by Chief Williams took place at Heman Park in University City. (T. 6/90).

Complaints Against Pagedale Police Officer Ricky Collins:

In the November 16, 1982 letter of Mayor Hall to the Board of Aldermen, which demanded the firing of Chief of Police Odis Williams and police officers Ricky Collins and Michael Hayles, the Mayor wrote:

> Collins has terrorized Pagedale by all the different complaints that have been received ranging from brutality to rape to overreacting, and using unnecessary force. (T. 6/81).

Alderwoman Louise Hall had also known of another complaint lodged against Officer Ricky Collins regarding sexual misconduct. (T. 3/24). Mayor Hall had told Louise Hall she had received the complaint connecting Collins with a *statutory rape.* (T. 3/243). This was after June of 1983. (T. 3/26). Louise Hall believed the allegations in the complaint and admitted that Officer Collins, himself, told her he had thought the victim was older than she said she was. (T. 3/26).

Alderman Taylor testified that he, too, had received a complaint that Officer Ricky Collins had raped a fifteen year old girl (T. 3/126). Taylor received this complaint in May, 1983. (T. 3/134). Taylor communicated the complaint about Ricky Collins' alleged statutory rape to Chief Williams, who told the Alderman to shut up and mind his own business. Williams also threatened to have Taylor thrown off the Board of Aldermen. (T. 3/135). Taylor also told Louise Hall about this complaint. (T. 3/137).

Further, Dowd personally received another complaint of sexual misconduct regarding Ricky Collins. (T. 6/78).

She also read in the St. Louis Post-Dispatch that Ricky Collins had used unusual force in making an arrest. (T. 6/24). She received still another complaint that Collins and another officer had struck a man on 70th Street in Pagedale. (T. 6/126).

Other Complaints Regarding The Pagedale Police Department:

Prior to Plaintiff's rape, Alderperson Dowd had received reports that Pagedale officers had taken women into Laurel Hills Cemetery across the street from the Pagedale City Hall. (T. 6/131). This was the cemetery where Plaintiff was raped by Hayles. (T. 2/1 et seq.). Mrs. Dowd knew the officers were not supposed to be in the cemetery with women. She said, ". . . [t]hey weren't supposed to be patrolling the dead." (T. 6/133). She also remembers testifying in her deposition that the officers were on duty with women in the cemetery—"loafing." (T. 6/134).

Assistant United States Attorney David Rosen testified he had received official complaints about civil rights violations by Pagedale police. (T. 4/78). He wrote a letter to Chief Williams, dated August 23, 1982. (T. 4/79). The letter cited, ". . . an increasing number of complaints concerning [Pagedale] police officers." (T. 4/82).

John Taylor received other complaints concerning sexual misconduct by Pagedale police officers prior to the rape of Ellena Harris. (T. 3/137). He had received between 15 and 20 anonymous complaints while he was on the Board and referred them all to the Police Chief. When Taylor told the callers to contact the Chief of Police, they often told the Alderman that Chief Williams was also involved in the sexual misconduct. (T. 3/138). When Taylor attempted to follow up with the Chief to see if the callers had lodged their complaints, Odis Williams threatened the Alderman. (T. 3/139).

The late Mayor of Pagedale, Leatrice Dowd, accused Officer Moses King of brutalizing a pregnant woman, who then made a formal complaint regarding the incident. This was in 1980, when Mrs. Dowd was a member of the Board of Aldermen. (T. 6/62). Alderwomen Darline Crawley was the pregnant woman's landlady and Dowd and Crawley discussed the incident between themselves. (T. 6/64).

Category Two: Evidence of the Failure of Pagedale Officials to Properly Respond to Citizen Complaints

The Michelle Prothro Incident:

Chief Williams asked Lt. Searcy not to press the Prothro complaint because Williams was in hot water, had been having trouble in his job and had had trouble with Hayles before. (T. 3/61). Lt. Searcy read the letter which Chief Williams had written to Barbara Prothro to the jury. (T. 3/66).

St. Louis County Police Detective Alysia Johns could not get any cooperation from the City of Pagedale in the investigation of the Prothro incident. (T. 4/63). Det. Johns reported this to her superior, Major Moonier, and also told him she had run into a "stone wall" at Pagedale. (T. 4/64).

Alderwoman Louise Hall was unaware that any internal investigation of the Prothro incident had been made. Chief Odis Williams did not bring the matter to the attention of the Board of Alderpersons. Alderwoman Hall was not satisfied with the steps that were taken by the Pagedale administration in the handling of the matter because

she didn't think the investigation was carried out thoroughly. (T. 2/215).

In the letter to Barbara Prothro, Williams stated that he had interviewed Officer Tina Jones and Officer Alene Helms. It said that they had corroborated Hayles' version of the Prothro incident. However, Alene Helms denied doing so in trial. (T. 7/75). Tina Jones also contradicted Chief Williams' assertion. (T. 3/77).

City Attorney Jess Ullom did not have total confidence in the Williams investigation of Prothro. (T. 7/42).

According to Mr. Ullom, Mayor Hall was unaware that Hayles had been suspended over Prothro, as Chief Williams had informed the victim's mother. (T. 7/49). Although Chief Williams' letter to Barbara Prothro stated that Hayles had been suspended for two days, City Attorney Jess Ullom did not think Hayles was ever suspended at all. (T. 7/50).

According to Jess Ullom, neither of the two police officers who were present when Hayles allegedly assaulted Michelle Prothro (Tina Jones and Alene Helms) were called to testify before the Board. (T. 7/43). In contradiction to this testimony, Leatrice Dowd testified that when she was on the Board, both Jones and Helms appeared before the Board and corroborated Chief Williams' version of the Prothro investigation. (T. 6/86).

Leatrice Dowd, then a member of the Board of Aldermen and late Mayor of Pagedale, was not satisfied with Chief Williams' investigation of the Prothro incident. (T. 6/68). Dowd testified that Mayor Hall had recommended to the Board that Hayles be fired over the Prothro mat-

ter. (T. 6/71). Hayles was not fired or disciplined by the Board. (T. 6/71).

Alderman John Taylor, Louise Hall and Mayor Mary Hall felt the Prothro matter was being covered up. (T. 3/141). Louise Hall told Taylor she suspected a cover-up. (T. 3/142).

Detective Alysia Johns testified that in cases where the St. Louis County Police can obtain no cooperation from victims or, in this case, the Pagedale Police Department, the complaint is, in conformance with departmental practice, labelled as "unfounded." In fact, in her investigation, Det. Johns had not even been able to speak with Pagedale Police Officers Michael Hayles, Tina Jones or Alene Helms regarding their personal knowledge of the Prothro incident. (T. 4/63).

The Tammy Owens Videotape:

Although the Prothro investigation by St. Louis County Police was pending when Louise Hall and Mary Hall viewed the Tammy Owens videotape, they made no effort to inform the County police about the allegations made by Tammy Owens. (T. 3/22). Louise Hall testified she did not go back and tell any Board member about the tape. In fact, Louise Hall testified that the Owens videotape was never discussed with any other Pagedale Board members. (T. 2/191). Louise Hall and Mary Hall said there was no point in telling the Board because the Board members would not believe them. Louise Hall did not report the Owens allegations to any member of the Pagedale Police Department. (T. 2/192). She took no official action. (T. 2/194).

In contradiction to the testimony of Alderwoman Louise Hall, then Mayor Mary Hall stated that she brought the Tammy Owens videotape to the attention of the Board. The Board voted 4-2 against firing Hayles. (T. 6/181). There was no evidence that the Board conducted any investigation into the allegations made on the Owens videotape or that it requested its Chief of Police or any other law enforcement agency to do so.

Other Complaints Against Michael Hayles:

When Chief Charles Johnson confronted Hayles with the complaint of sexual misconduct in January, 1985, Hayles testified (in deposition) that Johnson took no official action regarding the matter. (T. 6/45).

Neither John Taylor, Louise Hall nor Leatrice Dowd admitted receiving notice of the complaints of Tammy West, Mary Ann Williams and Robin Lee. (T. 2/186-2/205; 3/2-3/43; 3/110-3/173; 6/48-6/162).

Mayor Mary Hall's Complaints Against Chief Otis Williams:

No member of the Board communicated with the Mayor regarding her accusations against Chief Williams. No action was taken on the accusations. (T. 6/202).

Complaints Against Pagedale Police Officer Ricky Collins:

No member of the Board communicated with the Mayor regarding her written accusations against Ricky Collins. No action was taken on the complaint. (T. 6/202).

Although Alderwoman Louise Hall believed that Ricky Collins was guilty of statutory rape, she did not bring the

matter to the attention of the Board of Aldermen. (T. 3/27).

When Alderman Taylor communicated the complaint regarding Ricky Collins to Chief Williams, the Chief of Police told Alderman Taylor to shut up and mind his own business. (T. 3/135).

Other Complaints Regarding The Pagedale Police Department:

When Alderman John Taylor followed up on the 15 to 20 citizen complaints that were directed to Chief Williams, the Chief of Police told Alderman Taylor to shut up and threatened to throw him off the Board. (T. 3/139).

Mayor Dowd, then an Alderwoman, voted to keep Odis Williams on as Chief of Police even after he had been convicted of two counts of perjury. (T. 6/94). She would have kept him as Chief and the Board removed him only reluctantly. (T. 6/155-156).

Category Three: The Authority of the Mayor, The Board of Aldermen and the Chief of Police

The Mayor

Louise Hall testified the Mayor had the authority and responsibility to take action once investigations of citizen complaints are complete. (T. 3/4). Before January 29, 1985, the Mayor, among others, had the authority to receive citizen complaints regarding police misconduct, sexual misconduct, physical abuse and false arrest. (T. 6/53).

Jess Ullom testified that the Mayor, under statute and ordinance, had the authority to investigate citizen

complaints. (T. 7/55). The Mayor can also suspend city employees, including police officers, and has the authority to supervise the entire executive branch, by state law, and, under statute, to see to it that all the laws are vigorously supported. (T. 7/56).

The Board of Alderpersons

Alderwoman Louise Hall testified that the Board had the authority to take action after investigations on citizen complaints were conducted. (T. 3/4). According to Leatrice Dowd, the Board had the responsibility and authority to receive citizen complaints. (T. 6/53).

The Chief of Police

The Chief had the duty and responsibility to investigate citizen complaints, according to Louise Hall. (T. 3/4). He could suspend police officers until the next Board meeting. (T. 3/5).

John Taylor testified that the Chief:

—Had the authority to fire police officers until June, 1983. (T. 3/120);

—Lost the authority because Chief Williams constantly brought disciplinary actions against white officers. (T. 3/120);

—Suspended officers 10-15 times while Taylor was on the Board. (T. 3/122);

—Suspended Officer Michael Goodrich for police brutality (T. 3/124) on more than one occasion. (T. 3/125);

—Suspended Officer Meadows on more than one occasion. (T. 3/126);

—Suspended Officer Corbett on more than one occasion. (T. 3/127).

Mayor Dowd testified that the Chief:

—Had authority to discipline officers (T. 6/52);

—Had authority to receive citizen complaints. (T. 6/53);

—Was usually asked to investigate such complaints. (T. 6/53);

—Had authority to reassign officers to other shifts without Board approval. (T. 6/57);

—Had training authority. (T. 6/57).

Mayor Dowd admitted that, in her deposition, she had testified that Chief Williams usually hired police officers. (T. 6/73). Also in her deposition, Dowd testified that Former Chief Merle Guyot had authority to suspend officers. (T. 6/159). Chief Williams could suspend officers, "... for a little while." (T. 6/152).

Mayor Hall testified that when she was first elected to the Board, Chief Williams made policy concerning police procedures. (T. 6/203).

City Attorney Ullom testified that the Chief:

—Could suspend officers. (T. 7/35);

—Can always investigate whatever he wants. (T. 7/38);

—Displayed, by writing the letter to Barbara Prothro, "... an example where the Chief, without asking anybody's approval, initiated solely on his own a two-day suspension against a police officer." (T. 7/52);

—Had authority to suspend officers under Pagedale ordinance. (T. 7/53);

—Had duty and authority to investigate wrongdoing concerning his personnel. (T. 7/54);

—Had inherent authority to supervise the police department and to set internal policy within the police department. (T. 7/54);

—Had suspended Officers Goodrich and Meadows on his own authority. (T. 7/55).

Clearly, the amount of substantive evidence of prior misdeeds of Pagedale police officers and of the deliberate indifference of Pagedale officials satisfies even the most stringent standard of proof imaginable. Petitioner continues to state without equivocation its aggravating argument that ". . . not one whit of evidence" was adduced at trial to support Respondent's verdict and affirmance. Such spurious assertions can only make one wonder if counsel for Petitioner City was awake during trial.

Indeed, the case of Ellena Harris portrays a chilling story of petty politicians concerned more about their own personal aspirations and animosities than in their public responsibility of protecting the unfortunate women of Pagedale who repeatedly complained of the sexual molestation being committed by the municipality's police officers. A continuing failure of policymakers to remedy a known pattern of police brutality is sufficient to incur supervisory and municipal liability under 42 U.S.C. § 1983. *Herrera v. Valentine*, 653 F.2d 1220, 1225 (8th Cir. 1981); *Depew v. City of St. Mary's, Georgia*, 787 F.2d 1496, 1499 (11th Cir. 1986); *Black v. Stephens*, 662 F.2d 181, 191 (3d Cir. 1981), cert. denied 455 U.S. 1008 (1982); *Fundiller v. City of Cooper City*, 777 F.2d 1436 (11th Cir. 1985); *Fiacco v. City of Rensselaer*, 783 F.2d 319, 326-332 (2d Cir. 1986).

Herrera v. Valentine, 653 F.2d 1220 (8th Cir. 1981), was a case very similar to the present one. In *Herrera,* a woman beaten by a police officer filed a Section 1983 action against the officer and the city by which he was employed. The jury returned a verdict against both the police officer and the municipality. On appeal, the city claimed that the plaintiff had not adduced the evidence to support a finding of a municipal custom or policy.

The Eighth Circuit rejected that argument, noting that plaintiff had proven numerous citizen complaints protesting the misconduct of the city's police department, had shown that formal complaints were lodged by the Nebraska Indian Commission and County Attorney's Office with the city and that a report had been prepared by an outside consulting firm criticizing the city and its operation of the police department. 653 F.2d at 1225. Despite these complaints pertaining to prior acts of police brutality, the city took no steps to remedy or correct the problem. This inaction in the face of numerous complaints of police brutality was sufficient to sustain municipal liability under 42 U.S.C. § 1983, Id.

Using similar reasoning, the Third Circuit Court of Appeals held that the acquiescence of a chief of police to the use of excessive physical force by his subordinate police officers would support a finding of municipal liability. *Black v. Stephens,* 622 F.2d at 191.

Finally, in another police brutality case, the Eleventh Circuit wrote:

> The complaint states that the City of Cooper City has a custom of allowing the use of excessive [police] force. If established, this allegation provides the

> requisite fault on the part of the City, as a persistent failure to take disciplinary action against police officers can give rise to the inference that a municipality has ratified conduct, thereby establishing a "custom" within the meaning of Monell.

Fundiller v. City of Cooper City, 777 F.2d 1436 (11th Cir. 1985).

The standard announced in *Herrera, Black,* and *Fundiller* has been overwhelmingly met in this case.

The cases of *Baker v. McCoy,* 739 F.2d 381 (8th Cir. 1984); *Patzner v. Burkett,* 779 F.2d 1363 (8th Cir. 1985); *Strauss v. City of Chicago,* 760 F.2d 765 (7th Cir. 1985) and *Gilmere v. City of Atlanta,* 737 F.2d 894 (11th Cir. 1984) are distinguishable on their facts.

In *Baker,* the Eighth Circuit ruled that municipal liability was not shown because there was no evidence of a "pattern of similar incidents" of unconstitutional conduct. 739 F.2d at 385. Similarly, in *Patzner,* the plaintiff alleged that the defendant police officer had been involved in six prior arrests, involving physical confrontation. However, the plaintiff failed to allege that the use of physical force was improper or that the previous arrestees had complained about the arrests. 779 F.2d at 1367. *Strauss* involved the use of statistical evidence to show that a number of citizen complaints had been received regarding the municipality's police force. There was no proof, however, as to the specific nature of the complaints nor that the complaints were not thoroughly investigated and acted upon. 760 F.2d at 767. Finally, in *Gilmere v. City of Atlanta,* 737 F.2d 894 (11th Cir. 1984), the Eleventh Circuit found that municipal policymakers had not been put on notice of the existence of excessive police force. 737 F.2d at 902.

The cases cited above differ from the instant matter in that, in those cases, the plaintiffs simply did not prove or allege the factual elements of a Section 1983 cause of action. By contrast, in the present case, the plaintiff has. There can be no doubt that Ellena Harris proved a number of incidents of citizen complaints of police brutality. In addition, Respondent adduced specific details of these incidents, including the identities of the victims and perpetrators, and the nature of the brutality. Harris also established that the prior citizen complaints were received by, or brought to the attention of, Pagedale policymakers who failed to adequately investigate or pursue the matters. For these reasons, the decisions relied upon by Pagedale are irrelevant to this case.

Furthermore, Pagedale's commentary on negligence and 42 U.S.C. § 1983 is quite inapposite to this appeal. The recent decisions of *Daniels v. Williams,* 474 U.S. —, 88 L.Ed.2d 662 (1986) and *Davidson v. Cannon,* 474 U.S. —, 88 L.Ed.2d 677 (1986) relied upon by Pagedale, merely confirmed the proposition that negligent conduct can not amount to a violation of due process. Although *Davidson* and *Daniels* are obviously significant cases in the civil rights field, in general, they really have no impact on the merits of this case inasmuch as the courts have uniformly ruled for a number of years that something more than negligence must be proven to state a due process violation. See, e.g., *Hollins v. Powell,* 773 F.2d 191 (8th Cir. 1985); *Herrera v. Valentine,* 653 F.2d 1220 (8th Cir. 1981). Thus, in conformance with these rulings, Harris has alleged and proved intentional acts and conduct undertaken with deliberate indifference to the violation of her constitutional rights. Instruction number 9, which

was read to the jury, clearly defines a municipal custom as, inter alia, a "course of conduct of *deliberate indifference . . .*" (emphasis added). Nothing in the instructions given to the jury would have allowed the rendering of a verdict on the basis of common law negligence.

"*Although not necessarily adopted by a person or body with rulemaking authority,* customs can become so settled and permanent as to have the force of law." (emphasis added) *Monell v. Dept. of Social Services,* 436 U.S. at 690-91. Obviously, this describes the Pagedale situation perfectly.

Finally, the record clearly supports the jury's finding of deliberate indifference on the part of Pagedale policymakers. As defined by the Eighth Circuit, deliberate indifference may be proved by showing: 1) notice of a pervasive risk of personal harm; and, 2) a failure to reasonably respond to such a risk of harm. *Porm v. White,* 762 F.2d 635 (8th Cir. 1985); *Martin v. White,* 742 F.2d 469, 475 (8th Cir. 1984); *Wade v. Haynes,* 663 F.2d 778, 781 (8th Cir. 1981), aff'd sub nom *Smith v. Wade,* 461 U.S. 30 (1982); *Goodman v. Parwatikar,* 570 F.2d 801 (8th Cir. 1978).

Respondent has previously reviewed the notice that Pagedale officials received regarding the police harassment and brutality that was occurring within its police department and also extensively described the failure of the City to reasonably respond to the risk presented to its citizenry (i.e., failure to receive, investigate and act upon citizen complaints of police brutality). Substantial evidence exists in the record to support a finding of deliberate indifference.

II

THE EIGHTH CIRCUIT, IN HARRIS VS. PAGEDALE, IS UTTERLY CONSISTENT WITH HOLDINGS IN OTHER CIRCUITS, INCLUDING THE D.C. CIRCUIT'S OPINION IN CARTER VS. DISTRICT OF COLUMBIA

Respondent asserts that the holding in *Carter v. District of Columbia,* 795 F.2d 116 (D.C. Cir. 1986), relied upon by Petitioner in its Petition, is not in conflict with the holding of the Eighth Circuit United States Court of Appeals in the case at hand, nor is it at conflict with any other holding of any Circuit in the United States, as erroneously alleged by Petitioner. The *Carter* Court correctly stated the governing law, as contained in *Monell v. Department of Social Services,* 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978).

The *Carter* Court correctly noted that the standard of proof for a Section 1983 Plaintiff is that he or she must show a ". . . persistent, pervasive practice, attributable to a course deliberately pursued by official policymakers, one that caused the deprivation of constitutional rights Plaintiff experienced." (At Page 125). The *Carter* Court recognized that a Plaintiff may establish a sufficient case under Section 1983 by showing a Defendant's official policy or custom to condone unlawful acts through deliberate indifference to complaints. (See, Footnote 8, at Page 125). Unquestionably, the legal standard applied in *Carter* was the same standard applied in the case at hand. Therefore, Petitioner's allegation that there is a conflict between the Circuits is totally without justification and must be rejected.

Respondent recognizes that there are factual differences between the circumstances faced by the Court in

Carter, as opposed to the facts and circumstances presented to the Court in the instant case. In particular, the *Carter* Court noted, in that case, that the ". . . over-arching question," was whether or not the individual Defendants had, in fact, committed the wrongs alleged by Plaintiffs. (At Page 132). This is the opposite of the instant case, in which the City of Pagedale admitted the misconduct of Officer Hayles towards Respondent, and Officer Hayles had, prior to the trial in the instant case, entered a plea of guilty to the sexual assault against Harris.

Another factual difference between the two cases is that the District Court in *Carter* failed to properly limit the use of evidence of other misconduct. In the instant case, the Eighth Circuit noted that the District Court had meticulously instructed the jury as to the proper use of evidence of other misconduct. The *Carter* Court, in recognizing that a Section 1983 Plaintiff must show that the municipality was ". . . both on notice of and indifferent to wide-spread police brutality . . ." (at page 132), only held that the District Court committed reversible error by failing to instruct the jury as to the use of evidence of other misconduct. The Court emphasized, however, that this type of evidence against the City " . . . would have been in order if the District Court had properly circumscribed and controlled such evidence to protect against jury misuse." This is, put simply, the opposite of the facts and circumstances of the instant case.

Far from conflicting with the holding of the Eighth Circuit in the instant case, the *Carter* holding bolsters the Eighth Circuit's holding in the instant case. The *Carter*

Court recognized that one of the factual circumstances which may give rise to municipal liability in a Section 1983 case occurs where the municipality engages in a " . . . deliberate 'see no evil' policy." (At Page 124). The *Carter* Court noted that the Plaintiff in that case had failed to show a deliberate policy by policy making officials in the District of Columbia. In the instant case, Respondent Harris presented a specific, detailed factual showing of deliberate indifference by policymaking officials in the City of Pagedale to the allegations and complaints of sexual misconduct by its police force, including the Police Chief (who personally "stonewalled" at least one investigation by an outside agency). Should this Court follow Petitioner's absurd logic, a City, like the Respondent City of Pagedale, would be able to escape civil liability for gross violations of citizens' civil rights, even though every individual in a policymaking position in that municipality had knowledge of the facts and circumstances, by merely claiming that because the individuals failed to act collectively as a unit, they could not be held to be responsible for a deliberate policy. Nothing in the *Carter* case suggests this outrageous precedent.

CONCLUSION

For the foregoing reasons, this case does not present any questions of general importance which should be considered by this Court, nor does the Eighth Circuit opinion in *Harris vs. Pagedale* conflict with holdings

among other circuits, and the Petition for a Writ of Certiorari to review the judgment and opinion of the Eighth Circuit should be denied.

Respectfully submitted,

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